Global Trade Report

NEVILLE PETERSON LLP October 2009

Senate Calls for Duty Suspension, Correction Bills

Senator Max Baucus (D-MT), Chairman of the Senate Finance Committee and ranking minority member Charles Grassley ®-IA) have issued a call to their Senate colleagues setting October 30, 2009 as the deadline for introducing legislation to be included in a Miscellaneous Tariff Bill (MTB) to be enacted this year.

Enactment of an MTB – which contains various technical amendments to the tariff schedule, as well as temporary suspensions or reductions in tariffs for various items – is considered a priority this year, since most duty suspension or reduction measures currently in force are scheduled to expire at the end of 2009.

The House of Representatives considered MTB legislation in 2008, but failed to enact it. House Ways and Means Committee Staff have indicated that the Committee will introduce an "omnibus" measure, containing a wide range of bills that received consideration last year. Firms wishing to secure new duty suspensions or reductions should do so by having their measures introduced initially in the Senate, with the expectation that favorably considered measures will be added in House-Senate conference proceedings.

The Committee's call for legislation can be accessed on Senate website. Companies interested in having duty suspension litigation considered for the bill can contact our offices for assistance.

Economic Woes Prompt Trade Remedy Filings

A weak economy has affected numerous domestic industries, and the pain has become sufficient for many that they are calling on the government to provide relief under the trade remedy laws.

On the heels of President Obama's decision to impose temporary safeguard tariffs on a wide range of passenger and light truck tires from China, domestic producers feeling injured or threatened by imports have flocked to trade agencies with their own petitions for relief.

Recent petitions filed with the United States International Trade Commission and Department of Commerce seek the imposition of antidumping and countervailing duties on Sodium and Potassium Phosphate Salts from the People's Republic of China; Standard Steel Fasteners from the People's Republic of China and Taiwan; Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe; and Coated Paper from the People's Republic of China and Indonesia. Antidumping duties are sought on imports of Refined Copper Pipe and Tube from the People's Republic of China and Mexico.

Firms complaining about patent infringement by imports have also been active on the trade remedy front, with recent petitions filed under Section 337 of the Tariff Act of 1930 against certain Inkjet Supplies; Ceramic Capacitors; and Printing and Imaging Devices. Section 337, which allows the ITC to order the exclusion from United States of infringing goods, is fast become an "ultimate weapon" for patent holders looking to bring District Court patent litigation, or even patent licensing negotiations, to a swift conclusion. Section 337 has been repeatedly criticized by the World Trade Organization as violating "national treatment" principles, since it gives domestic patent owners a second remedy against infringing imports which is not available against infringing domestic goods.

Copies of the petitions, or additional information concerning trade relief protections, is available from our offices.

Customs Issues Guidance on Amended NAFTA Rules of Origin

United States Customs and Border Protection has issued a document providing guidance on amended and liberalized NAFTA Rules of Origin adopted by Presidential Proclamation 8405, which was published in the Federal Register on September 2, 2009

The proclamation created liberalized preference rules of origin for various goods, based on (1) 2007 amendments to the Harmonized Tariff Schedule of the United States, resulting from modification of the international Harmonized System (HS) nomenclature; and (2) modifications resulting from "Fast Track III" negotiations between the United States, Canada and Mexico.

The new, more liberal rules of origin are applicable to goods entered, or withdrawn from warehouse for consumption on or after October 2, 2009.

Products benefitting from the Track III liberalization include various spices, televisions, oil and petroleum products, leather, telephone equipment, video cameras, digital cameras and television cameras, electrical discharge lamps and ballasts, electrical signaling apparatus, locomotives and locomotive parts, truck part assemblies, hydrometers and floating parts thereof, measuring and checking equipment, automatic regulating and controlling apparatus and time switches with clocks or synchronous motors.

In addition, new rules of origin have been issued for products which were the subject of the 2007 changes to the HS nomenclature.

A copy of the Customs memorandum, which includes the Presidential proclamation and the USITC publication setting out the changes, is available here.

ITC, Customs Roles in 337 Enforcement Clash Again in CIT Decision

The question of which Federal agency is responsible for enforcement of 19 U.S.C. §1337 exclusion orders provided the focus for yet another recent clash in the United States Court of International Trade (CIT). Section 337 exclusion orders, most often issued in cases where imported goods infringe U.S. patents, order Customs officials to exclude infringing goods from entry into the United States.

In Funai Electric Co. v. United States, Slip Op. 09-109 (October 6, 2009), a domestic patent owner had secured a Section 337 exclusion order against imports of Certain Digital Televisions incorporating particular types of imaging hardware. Vizio, Inc., AmTran Technology and AmTran logistics, importers of the accused goods, redesigned certain chipsets to avoid infringing the Funai patent, and asked U.S. Customs and Border Protection (CBP) to rule that the redesigned chipsets, and TVs containing them, would not infringe the Funai patent. CBP agreed, and issued a ruling allowing importation of TVs with the chipsets.

Funai, the patent owner, sued CBP upon learning of the ruling, asserting that only the United States International Trade Commission (ITC), which issues Section 337 exclusion orders, had authority to interpret them or to declare that products had been successfully redesigned to avoid infringement of the patents. It sought a CIT order enjoining importation of all accused products, until and unless the ITC directed their entry.

In a rapidly-litigated case, Senior Judge Thomas J. Aquilino granted the government's motion to dismiss the action for lack of subject matter jurisdiction. He ruled that, although the CIT had jurisdiction to review Customs rulings involving a wide range of matters under the jurisdiction of the Secretaries of Treasury and CBP, including rulings relating to "embargoes" a Section 337 order is not an embargo, and thus rulings concerning same do not fall within the CIT's limited grant of authority to issue declaratory judgments respecting rulings.

The Court further held that the action did not fall within its 28 U.S.C. §1581(I) "residual" jurisdiction, again noting that an exclusion order is neither an embargo nor a quantitative restriction. Asserting that the patent owner's complaint was not within the CIT's limited jurisdiction, the Court dismissed the suit.

The suit is yet the latest instance showing the tension between the authority of the ITC, which issues Section 337 exclusion orders, and can issue enforcement and advisory opinions regarding them, and CBP, which has line authority for enforcing such orders and whose Restricted Merchandise Branch is often called upon to determine whether a particular imported product is within the scope of a Section 337 order. Since Section 337 orders only mandate the exclusion of "infringing" goods, Customs perforce is required to render determinations concerning patent infringement matters.

The CIT's Funai Electric decision is available on the Court's website.

US, EU Issue IPR Identification Guides

To assist trademark and copyright holders in protecting their intellectual property in international trade, United States Customs and Border Protection (CBP) and the European Union have jointly prepared and issued some new documents to assist holders in engaging Customs agencies to help them protect those rights and to detect and seize pirated and counterfeit merchandise..

A brochure entitled Protecting Intellectual Property Rights at our Borders provides some basic information concerning the roles of the US and EU Customs authorities in enforcing IP rights at the border. In addition, CBP has provided a set of IPR Protection Guidelines for the assistance of the public.

Protecting intellectual property has become an increasingly important component of CBP's enforcement portfolio. Customs Reauthorization legislation currently pending in Congress would require the agency to increase IPR enforcement staffing, both in Customs Headquarters and at ports of entry throughout the United States.

CIT Declines to Make "Reasonable Care" Declaration

Facing a possible Customs penalty, but looking for an advance judicial determination that you exercised "reasonable care" in your import operations? Don't look to the United States Court of International Trade, according to a new decision.

In Kahrs International Inc. v. United States, Slip Op 19-101 (September 18, 2009), an importer of wooden flooring panels who had entered the panels under the duty free HTS subheading 4418.30 provision for "builder's joinery: parquet panels" challenged Customs' reclassification of its products under dutiable provisions for "plywood". Apparently concerned that it faced penalty liability for prior, liquidated entries of this merchandise, the importer included in its complaint a count asking the CIT to declare that it had exercised "reasonable care" in making those entries.

The CIT dismissed the "reasonable care" claim for lack of jurisdiction. First, the Court noted that it could only exercise its 28 U.S.C. §1581(a) "protest" jurisdiction over specific entries covered by a denied protest before the court. It lacked authority to render determinations on any other entries.

Second, the Court noted that its 28 U.S.C. §1581(I) "residual" jurisdiction did not apply in cases where other bases of jurisdiction could be used to raise an issue. It was not an open-ended grant of jurisdiction to consider questions as to transactions for which a protest had not been filed.

The lesson for importers: if the question is not whether your classification, value declaration, or other Customs transaction is correct, but whether you used "reasonable care" don't expect the CIT to ride to the rescue before Customs can impose a penalty or sue to collect one. The court may consider such questions in the penalty context, but not in advance.

The Kahrs decision is available on the CIT's website.

Federal Circuit Reverses CIT on Wood Flooring Classification

However, Kahrs and other importers of wood flooring panels can draw hope from a recent decision of the United States Court of Appeals for the Federal Circuit (CAFC) which reversed a CIT decision concerning how wood flooring panels should be classified.

In Faus Group Inc. v. United States, Appeal No. 2008-1605 (September 25, 2009), the Court of Appeals for the Federal Circuit held that wood flooring panels – featuring plywood layers sandwiched around strips of wood, and featuring a photograph of wood grain on the top surface – were properly classified as "other" builder's joinery of HTS subheading 4418.40, dutiable at a rate of 3.2% ad valorem. [The importer had made a claim for duty-free treatment as "parquet panels", but appears not to have pursued it on appeal].

In so ruling, the CAFC reversed and vacated an earlier decision of the CIT which had held the panels to be classified under HTS Heading 4411 as "fiberboard" and assessed with duty at a 6% duty rate.

Both tariff provisions described the flooring panels, the CAFC held, but the HTS subheading 4418 provision for "builder's joinery" was more specific, for two reasons. First, that provision requires wood to have been processed, while heading 4411 can include either unprocessed or processed wood products. Second, the term "builder's joinery" in HTS Heading 4418 is a "use" provision, the court held, connoting assembled wood articles which serve non-structural purposes in building interiors. As the wood panels are installed over a pre-existing floor, they are non-structural, the CAFC said, and provisions which classify by use (such as Heading 4418) are generally more specific than those which classify by description (Heading 4411).

The Faus Group decision, will be of interest to a number of importers who have been fighting CBP for years over the classification of wood flooring, parquet panels, wood strips, tileboards and similar articles.

"Byrd Amendment" Free Speech Fight: Next Stop, Supreme Court?

Does the "Byrd Amendment", which awarded antidumping and countervailing duties to domestic producers who supported petitions to impose these levies violate First Amendment Free Speech rights? The Court of Appeals for the Federal Circuit said "no", but an apparent split in the circuit, made evident by a recent procedural decision, suggests that the matter may be headed to the United States Supreme Court for resolution.

In SKF-USA Inc. v. United States Customs and Border Protection, Appeal No. 2008-1005 etc., the question was whether, by limiting Byrd Amendment distributions to domestic producers who "actively support" antidumping and countervailing duty petitions, while denying distributions to domestic producers who opposed petitions or took no position, the Tariff Act of 1930 penalized firms for engaging in certain forms of "political speech", in violation of the First Amendment to the Constitution. The United States Court of International Trade said yes, holding that the statute improperly imposed a disadvantage of domestic producers who might be just as injured by unfairly-traded imports but who, for whatever reasons, elected not to actively support petitions for the imposition of antidumping and countervailing duties.

Earlier this year, the Federal Circuit reversed that decision. In a controversial 2-1 opinion, the CAFC reasoned that the purpose of the Byrd Amendment was to "reward" firms for "assisting" the government in the enforcement of antidumping and countervailing duty laws. Monies paid under the Amendment were in the nature of quasi-contractual payments for help rendered or services provided. Domestic producers' positions regarding petitions more closely resembled "commercial speech", which receives a lower level of Constitutional scrutiny, the CAFC majority had held, notwithstanding a blistering dissent by Judge Richard Lynn.

Domestic producers asked the entire Federal Circuit to reconsider the decision en banc. In a decision handed down on September 29, 2009, the CAFC, by an 8-4 vote, decided not to grant a rehearing.

However, Judge Linn, joined by Circuit Judges Pauline Newman, Randall Rader and Kimberly Moore, issued a short but blistering dissent in which they asserted the Byrd Amendment's domestic support provision to be unconstitutional, and noted that the case involves significant Constitutional free speech issues – as well as nearly $1 billion in undistributed Byrd Amendment funds which is awaiting resolution of the decision before it can be paid out.

The dissent argued that the Byrd Amendment's "domestic support" requirement unlawfully penalizes firms for engaging in political speech (opposition to a petition) or for failing to engage in such speech (taking a neutral position). The dissenters noted that the government has no particular interest in the imposition of antidumping or countervailing duties, only an interest in a "fair" proceeding. They also took note of the fact that all domestic producers assist the government in conducting antidumping and countervailing duty investigations, in part by answering questionnaires which have the force and effect of subpoenas. They also criticized the majority for trying to compare Byrd Amendment position-taking with "commercial speech", noting that the majority had not declared it to be commercial speech per se, but instead some type of amorphous hybrid conduct.

While the CAFC's recent decision does not change the posture of the case, the fact that there is a sharp dissent among circuit judges may persuade the Supreme Court to review the case. Stay tuned.

President Criticized for Imposing Safeguard Duties on Chinese Tires

President Obama came in for harsh criticism recently, when he announced that the United States would impose safeguard duties on a wide range of passenger and light truck tires imported from the People's Republic of China.

Adopting a majority recommendation from the United States International Trade Commission in a Section 421 investigation of Consumer Tires from China, the President declared that additional duties would be imposed, over and above the 4% ad valorem duties ordinarily assessed on tires, beginning September 26, 2009.

For the first year, the additional levy would be 35% ad valorem (added to the regular duties on the tires), dropping to 30% ad valorem in the second year and 25% ad valorem in the third year.

The tariffs were imposed after domestic unions representing workers at tire factories complained that increased imports of Chinese-origin tires –

which have skyrocketed to almost $2 billion per year – were causing "market disruption" to the United States market for such tires.

China has requested World Trade Organization (WTO) consultations on the measures, and the President's decision to impose the tariffs has been decried by many as protectionist, or an accommodation to labor unions for political support.

CBP Trade Symposium Set for December 8-10

Customs and Border Protection's annual trade symposium has been set for December 8-10, and will be held for the first time at the larger Walter E. Washington Convention Center. CBP has opened registration for the event.

The three-day symposium will address a wide range of current issues, including the "10+2" Importer Security Filing program, C-TPAT, Customs' Intellectual Property Rights Enforcement, and Navigating CBP's binding rulings program.

In person registration is $290 for the conference. For the first time this year, CBP is also offering videoconference registration for a fee of $35, for firms which might not want to travel to Washington for the event. Videoconference records will be maintained on the CBP website for at least 30 days after the symposium.

Information concerning the Symposium is available here.

Phase III of Lacey Act Enforcement Underway

The Agriculture Department's Animal and Plant Health Inspection Service (APHIS), together with U.S. Customs and Border Protection, kicked off Phase III enforcement for the new Lacey Act regulations, effective October 1, 2009.

The Lacey Act prohibits trade in plants and plant products which are harvested in violation of United States or foreign laws and regulations. Congressional amendments to the Act in 2008 mandated that importers present declarations indicated the genus and species of the wood used in imported articles, and the actual or possible countries of origin of such wood products.

Finding that full-scale implementation of the import declaration requirement would cause too much paperwork for both business and government, APHIS had agreed to phase in enforcement of the import declaration requirement.

Phase III enforcement commenced October 1, 2009. Under an amended phase-in schedule announced by APHIS, import declaration requirements now apply to a variety of additional wood articles provided for in Chapter 44 of the Harmonized Tariff Schedule, including wood charcoal (heading 4402), certain plywood veneered panels (heading 4412) and wooden frames (heading 4414).

Our firm has assisted importers in developing programs for identifying potentially applicable foreign and domestic laws, and in designing information-gathering programs to ensure timely and accurate Lacey Act declarations.

Dutch Firm, Owners, Plead Guilty to Export Violations

A Netherlands aircraft parts company and its owners have pleaded guilty to export control violations in connection with the shipment of aircraft parts to Iran.

Aviation Services International (B.V.), a Dutch company, and its owners, Robert Kraipoel, 66 and his son Robert Neils Kraipoel, 40, each pleaded guilty to a single count of a criminal information in United States District Court for the District of Columbia, charging them with violations of the International Emergency Economic Powers Act

(IEEPA). The individuals face possible 5 year jail sentences and criminal fines of $250,000. ASI has already agreed to pay a $100,000 fine and receive five years of administrative probation.

From 2005 to 2007, ASI placed orders with United States suppliers for aircraft parts to be exported to Iran, in many cases providing the U.S. shippers with false end-user certificates.

The scheme unraveled after U.S. Customs and Border Protection (CBP) officials detained a shipment in the course of exportation, and ASI's principals furnished false statements concerning the product's destination.

DDTC Updates Guidance on Employing Foreign Persons

The State Department's Directorate of Defense Trade Controls (DDTC), which enforces defense export controls, has published to its website updated guidance on the employment of foreign nationals by United States persons

The new guidelines seek to eliminate "double licensing" of foreign employees in many cases. Under past DDTC policies, it was sometimes necessary to obtain a technology license for a foreign employee on form DSP-5 and also enter into a Technical Assistance Agreement for the same employee, depending on the level of technology involved. The new policy indicates that, in most cases, only a DSP-5 license application will be required.

Different requirements apply when the foreign national will have access to classified technical data or will be involved in the production of Significant Military Equipment (SME). Employers are required to obtain Non-Disclosure Agreements (NDAs) from the employee.

DDTC has also reminded the public that if companies employ foreign nationals who will not have access to technical data controlled under the International Traffic in Arms Regulations (ITARs), the companies must have in place documented procedures to control access. Our experience has been that many companies required to have technology control plans in place either lack them, or have insufficient controls on access.

In a separate notice, DDTC has indicated that, beginning October 19, 2009, it will begin accepting certain agreements electronically, via the D-Trade-2 service. Guidelines for the preparation of electronic agreements have been issued. DDTC will continue to accept agreements in hard copy form (and some agreements can only be submitted in such form), but the agency does contemplate using electronic submission exclusively starting in fall 2010.

COOL: Canada Asks for WTO Panel

The United States Country of Origin Labeling (COOL) regulations for making country of origin declaration for beef and other agricultural products are too onerous and violate international trade rules, according to the Government of Canada. Following the failure of informal consultations to resolve complaints regarding the Agriculture Department's COOL regime, Canada has asked the World Trade Organization to organize a dispute resolution panel to hear its complaints concerning the COOL regulations.

Noting that over 80% of Canadian beef exports go to the United States, Canada's International Trade Commissioner Stockwell Day complained that the COOL requirements – which obligate shippers to note country of origin on shipping documents and invoices, and require U.S. retailers to provide point-of-sale origin information – are making it difficult for Canadian producers to compete effectively with American beef in the U.S. market.

The Canadian Cattlemens Association has complained that compliance with COOL regulations costs its members up to $100 per head of cattle in compliance costs, for a total of up to $300 million per year.

The U.S. has defended the COOL regulations as a reasonable method of informing United States consumers of important information concerning the origin of produce.

CITT Provides Expansive Definition for Agricultural Tariff Benefit

Reflectors used in lighting apparatus for greenhouses constitute apparatus for agricultural "machines" and thus qualify for duty-free treatment under Article 9903 of Canada's Customs Tariff, according to a recent decision of the Canadian International Trade Tribunal (CITT).

In P.L. Light Systems Canada v. Deputy Minister of National Revenue, AP-2008-012 (September 16, 2009), the issue presented was whether aluminum reflectors for greenhouse lighting could enter Canada duty free as "articles or materials that enter into the manufacture or repair of, or articles for use in, agricultural or horticultural machines, of " tariff heading 8436. The government argued that the lighting fixtures were not "machines" and that the reflectors were not properly considered items for the manufacture of qualifying machines. The Tribunal's determination turned on its definition of the term "machine" which, it conceded, was not defined in the relevant tariff provisions.

Examining English and French definitions, the Tribunal determined that, in order to be considered a "machine", an article need not use or transmit mechanical power. It also held that a machine could be operated either manually or by computers.

Since the reflectors are physically attached to the lighting fixtures, the Tribunal reasoned, they qualified for duty-free treatment under the Canada Customs Tariff.

Foreign Parties Can Seek Antidumping Injunctions, CAFC Holds

Foreign manufacturers and exporters have standing to seek preliminary injunctions against the liquidation of Customs entries with antidumping duty assessments, according to a new Court of Appeals for the Federal Circuit decision.

In Qingdao Taifa Group v. United States, No. 2008-1103 (September 28, 2009), a Chinese producer and exporter of Hand Trucks from China sued to challenge a Commerce Department determination which assigned it a punitive antidumping duty rate. The domestic petitioner opposed the injunction application, arguing that, as a foreign company which was not importer of record – and which was not liable for payment of antidumping duties – the Chinese producer lacked the ability to prove the likelihood of "immediate and irreparable harm" necessary to obtain in injunction against liquidation.

Reviewing the CIT's decision for abuse of discretion, the Federal Circuit held that the injunction was properly issued. The antidumping statute provides protections to "interested parties", the court held, including foreign producers. The Court concluded that the Chinese producer would suffer irreparable harm if the injunction were granted, and upheld the injunction.

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